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No. 88-417

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,

Petitioners,

v.

LOCKHEED CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF LOCKHEED CORPORATION

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October 7, 1988

QUESTIONS PRESENTED

1. Does 11 U.S.C. § 1125 mandate that a disclosure statement provide a professional evaluation of the debtors' pending litigation, or is the determination of whether adequate information is provided about the pending litigation best left to the discretion of the fact finder based on case specific circumstances?

2. Under the "Interim Emergency Rule" governing bankruptcy cases in the Northern District of Texas, between December 21, 1982, and July 10, 1984, was it constitutional for a bankruptcy court, as an integral part of a plan of reorganization, to determine the settlement value of lawsuits brought by debtors involving state law contract claims and order their discontinuance for fair consideration?

3. Where a bankruptcy judge has announced in open court his approval of a plan of reorganization and preliminary supporting findings and conclusions, does the involvement of the prevailing party in the preparation of the final written findings and conclusions require that approval be set aside under Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, even though the evidence clearly supports the finally adopted findings and conclusions?

LIST OF PARTIES

Those parties listed in the petition. Additionally, the following are affiliates of Lockheed Corporation (which has no parent company and no subsidiaries that are not wholly owned):

1. Airod Sdn Bhd
2. CADAM France S.A.R.L.
3. CADAM Services Company
4. Gulf Technology Systems Group
5. Letlock Saudi Arabia Co., Ltd.
6. Lockheed-Arabia
7. Lockheed Technical Services (Malaysia) S.B.
8. Pacific Aerospace Corporation Limited
9. Transnational Housing Company

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF LOCKHEED CORPORATION

Respondent, Lockheed Corporation, ("Lockheed"), respectfully prays that the Petition of Texas Extrusion Corporation, ("Texas Extrusion"), Pickens Industries, Inc. ("PII"), Richard W. Pickens and Louise R. Pickens, for a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988, be denied.

STATUTE INVOLVED

11 U.S.C. § 1129(a) provides in pertinent part:

(a) The court shall confirm a plan only if all the following requirements are met:

* * *

(7) With respect to each impaired class of claims or interests —

(A) each holder of a claim or interest of such class

(i) has accepted the plan; or

(ii) will receive or retain under the plan . . . not less than the amount that such holder would so receive or retain if the debtor were liquidated . . .

COUNTERSTATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

This proceeding commenced almost seven years ago on March 24, 1982, when Texas Extrusion filed for protection from its creditors under Chapter 11 of the Bankruptcy Code.[1]

Progeny of the bankruptcy filing included two lawsuits brought against Lockheed and Lockheed Finance Company, the first instituted by Texas Extrusion on March 20, 1984, (the "Corporate Lawsuit") and the second brought by Richard and Louise Pickens, on November 15, 1983 (the "Individual Lawsuit"). Both lawsuits involved claims related to alleged

[1] PII which owns 100% of the stock of Texas Extrusion filed for bankruptcy at the same time. Richard and Louise Pickens, who together own 80% of the stock of PII filed for bankruptcy January 3, 1983, and November 21, 1983, respectively.

breaches of supply contracts between Texas Extrusion and Lockheed.

On October 28, 1983, a little over 18 months after the original bankruptcy filing, the bankruptcy court appointed a trustee to oversee the Texas Extrusion bankruptcy estate because the debtor in possession had accumulated post-petition liabilities of almost one million dollars, including unpaid federal withholding taxes in excess of two hundred thousand dollars.

On November 21, 1983, the trustee informed the Bankruptcy Court that Texas Extrusion could not be operated at a profit and would continue to incur substantial post-petition debt. Accordingly, the bankruptcy court ordered Texas Extrusion to discontinue all operations.

On November 15, 1983, in the vacuum created by the debtors' inability to properly operate the business of Texas Extrusion, the debtors' failure to propose any type of plan of reorganization, and with no indication any plan would be forthcoming from the debtors in the foreseeable future, Lockheed, as the largest creditor of Texas Extrusion, and the Official Creditors Committee, proposed a joint plan of reorganization (the "Joint Plan").[2]

The Joint Plan essentially provided for (1) Cressona Aluminum Company to purchase the principal assets of Texas Extrusion and those assets of the Pickens necessary to operate that business, (2) the payment of all administrative and post-petition liabilities, (3) the payment by Lockheed, of $475,000.00 to the unsecured creditors, and (4) the discontinuance of the Corporate and Individual Lawsuits. In effect, the settlement of the lawsuits was worth at least seven million dollars to the debtors, based on the fact Lockheed kept virtually none of the cash realized under the Joint Plan and the debtors were released of all obligations to Lockheed.

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[2] The plan was "joint" because while it was one document it separately addressed the four independent but related bankruptcy proceedings: (1) Texas Extrusion, (2) PII, (3) Richard Pickens and, (4) Louise Pickens.

On January 13, 1984, a lengthy hearing was held to consider numerous objections of the debtors to the disclosure statement for the Joint Plan. A disclosure statement incorporating changes required by that hearing was approved by the Bankruptcy Court on January 24, 1984.

On March 20, 1984, Judge John Ford of the United States Bankruptcy Court for the Northern District of Texas confirmed the Second Amended Joint Plan under Section 1129 of the bankruptcy code. The Joint Plan had to satisfy the requirements of that section because of the existence of impaired classes of creditors who were debtors in the related but independent bankruptcy proceedings who had not accepted the Joint Plan. To confirm the plan, Judge Ford had to conclude as a matter of federal bankruptcy law that those impaired creditors would not receive less under the Joint Plan than in liquidation.

On December 30, 1986, Judge Robert Porter, United States District Judge for the Northern District of Texas, issued a memorandum order, in response to appeals by the debtors of the order confirming the Second Amended Joint Plan, affirming all actions of the bankruptcy court in confirming that plan.

Debtors appealed to the United States Court of Appeals for the Fifth Circuit and the case was orally argued on November 3, 1987, before Circuit Judges, Jerre S. Williams and Patrick E. Higginbotham, and Barefoot Sanders, a District Judge, setting by designation.

In a lengthy opinion by Judge Williams, the Fifth Circuit upheld the actions of the Bankruptcy Court as affirmed by the District Court.

II.

STATEMENT OF FACTS

Much of what is said in petitioners' statement of the case represents a self-serving reading of disputed facts.

Respondent will agree that the underlying dispute between the parties centers on two supply agreements and a series of loans representing $5.5 million dollars of principal provided by Lockheed Finance Company for the benefit of Texas Extrusion.[3] Respondent disputes virtually every other "factual" statement by petitioners relating to the Texas Extrusion-Lockheed relationship. For example, petitioners suggest the second supply agreement between Texas Extrusion and Lockheed "purported" to release any claims petitioners believed they had under the first agreement. The following language from the second supply agreement does not "purport" to release claims, it accomplished that result:

> The parties hereto agree that this Agreement supersedes and replaces the agreement of February 22, 1979, as amended, including Amendment No. 1 dated April 4, 1979, between the parties and that the parties waive all rights or claims under said Agreement (except for uncompleted purchase orders) and each party releases the other from its obligations under said Agreement (except for performance and payment under uncompleted purchase orders).

Appendix at 77a

Similar creative license was taken by petitioners in describing the involvement of respondent's counsel in the finalization of the written findings of fact and conclusions of law supporting the previously announced decision of the bankruptcy judge to confirm the Joint Plan. Contrary to petitioners' assertions, there were not "repeated and extensive discussions" between counsel for Lockheed and the bankruptcy judge with respect to the

[3] At the time Texas Extrusion filed for bankruptcy that obligation with interest was in excess of seven million dollars, and had been assigned to Lockheed.

written findings and conclusions. In fact, "discussions" with the judge did not occur. Rather, the contact involved the submission of written findings of fact and conclusions of law to the law clerk for the judge followed by revisions to those conclusions and findings as suggested by the law clerk. In short, counsel for Lockheed served as nothing more than a scrivener for the judge, who in open court at the conclusion of the hearing had announced his decision and a preliminary basis for that decision before counsel prepared anything.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

PETITIONERS' CHALLENGE TO THE ADEQUACY OF THE DISCLOSURE STATEMENT SEEKS TO HAVE THIS COURT REVIEW ALLEGED ERRORS EITHER NOT PROPERLY PRESERVED OR INVOLVING A FACTUAL DETERMINATION WHICH IS CONSISTENT WITH STATUTORY REQUIREMENTS AND COURT DECISIONS.

Petitioners challenge the adequacy of the Disclosure Statement on three grounds: (1) the claimed absence of any language in the Disclosure Statement about the importance of the value of the Corporate and Individual Lawsuits to what creditors would receive under the plan, (2) the failure of the Disclosure Statement to discuss the possibility that Lockheed's claims could be equitably subordinated, and (3) the failure of the Disclosure Statement to place a specific dollar value on the Corporate and Individual Lawsuits.

Petitioners never raised the first two alleged deficiencies in the written objections they were required to provide to the bankruptcy court on the proposed disclosure statement. Having failed to preserve those alleged errors, petitioners cannot now be heard to complain.[4]

With respect to the third alleged deficiency, Petitioners are simply incorrect when they suggest that the Fifth Circuit was acting contrary to statutory requirements and existing precedent in approving a disclosure statement that did not place a specific dollar value on the Corporate or Individual Lawsuits. Although courts often consider litigation in which the debtor is involved as a material issue that should be revealed in the disclosure statement, *see, In re Route 202 Corp.*, 37 Bankr. 367, 375 (Bankr. E.D. Pa. 1984); *In re Fierman*, 21 Bankr. 314 (Bankr. W.D. Pa. 1982), they do not routinely require professional evaluation of that litigation. *In re The Stanley Hotel, Inc.*, 13 Bankr. 926, 935 (Bankr. D. Colo. 1981); *In re Werth*, 29 Bankr. 220, 223-224 (Bankr. D. Colo. 1983); *In re East Redley Corp.*, 16 Bankr. 429 (Bankr. E.D. Pa. 1982).[5]

The teaching of these cases is consistent with the general understanding of § 1125 of the bankruptcy code that the "adequate information" necessary for a creditor to make an informed choice about the acceptability of a plan of reorganization is a subjective determination made on a case by case basis.[6]

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[4] The Fifth Circuit explicitly recognized this point with respect to equitable subordination when it noted: "At no time prior to the approval of the Disclosure Statement or at anytime since then has any party brought an action against Lockheed for equitable subordination of its claims against debtors." Appendix at 28a. The other issue was never presented to the Fifth Circuit.

[5] The case cited by petitioners as contrary to this position is internally inconsistent, *see In re Malek*, 35 Bankr. 443, 444 (Bankr. E.D. Mich. 1983) ("*where possible* proponents *should* provide evaluation of probable success of litigation," vs. "the disclosure statement *must* include a professional evaluation of the probable success of . . . litigation.")

[6] In fact, § 1125(b) of the Bankruptcy Code specifically provides that "the court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets."

In re Brandon Mill Farms, Ltd., 37 Bankr. 190, 192 (Bankr. N.D. Ga. 1984); *In re The Stanley Hotel, Inc.*, 13 Bankr. 926, 930 (Bankr. D. Colo 1981); *See also*, Legislative History at H.R. Rep. No. 595, 95th Cong., 1st Sess. 408, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6365.

In this matter, the disclosure statement clearly communicated that the value of the lawsuits to creditors was less than the payout proposed under the Joint Plan, otherwise, the Joint Plan would not have been proposed by the Official Creditors Committee. The disclosure statement also provided a six page description of the background to those lawsuits and succinct descriptions of the claims in both lawsuits. Appendix 119a-125a, 146a-148a. That background was buttressed by a letter from the Official Creditors Committee, which accompanied the disclosure statement, and commented that the major alternative to the Joint Plan would be to continue with the lawsuits. The letter noted that because of the expense and delay associated with the litigation and the uncertain results there was not a potential for a one hundred percent dividend. Further information concerning the Corporate Lawsuit was provided in a letter petitioners sent to all creditors, referred to by the bankruptcy court as a "hustle" letter, stating petitioners' view that the Corporate Lawsuit could result in a recovery of twenty-seven million dollars.

Petitioners failed to introduce evidence at the hearing on the disclosure statement why a "reasonable investor" would need further information about the lawsuits, how such additional information would have had any relevance in such a person's evaluation of the Joint Plan or why an informed choice could not be made in the absence of such information. In fact, the petitioners concede at page 13 of their petition that the disclosure statement did provide some guidance to the creditors about the lawsuit, although inconsistent with petitioners' evaluation of their cases. In short, the real complaint of petitioners is not that the disclosure statement failed to convey a value of

the lawsuits, but rather that it conveyed a view of the lawsuits different than their own.

Petitioners have only themselves to blame for the absence of competing or additional views in the disclosure statement concerning the value and importance of the lawsuits. In response to petitioners' concerns about the adequacy of the description of the litigation, the bankruptcy court offered petitioners an opportunity to include their views about the lawsuit in the disclosure statement. Petitioners refused this offer and should not now be heard to complain that insufficient information was provided to creditors. Clearly if they thought the lawsuits were worth more or that the Joint Plan should not be accepted because of a high probability the lawsuits would have generated more money for creditors then the Joint Plan, that information could have been included in the disclosure statement by them. In fact, petitioners provided just such information in their "hustle" letter. Moreover, the petitioners as the parties who instituted the lawsuits, were in the best position to estimate complexity, expense and likely duration, although a reasonable investor should have been able to reach conclusions on these factors based on the information in the disclosure statement.

Finally, petitioners who were all debtors, and intimately familiar with the details of the litigation, have never introduced any evidence suggesting that any creditor believed that it did not receive adequate information or was in some way misled by the disclosure statement's discussion of the importance or value of the litigation. If the disclosure statement was as inadequate as petitioners claim, it would seem reasonable that petitioners could have convinced some creditor to join in their challenge to the Joint Plan in the four and one-half years since it was confirmed.[7] No creditor, not also a "debtor", has ever challenged the disclosure statement.

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[7] The location of such a creditor should have been relatively easy, given petitioners' "hustle letter."

In short, this matter does not present a circumstance where *some* valuation of a key asset of the debtor was not provided. Rather the issue is whether, based on the information made available to the creditors in this case, they could make an informed choice about the Joint Plan and the Fifth Circuit concluded that standard had been satisfied. Given the numerous factors which impact what constitutes adequate information, a decision by the Court in this case will do little to provide guidance in other situations, especially where no true conflict of authorities has been shown to exist, and the Fifth Circuit followed the correct statutory standard.[8]

[8] The Court's decision in *TMT Trader Ferry v. Anderson,* 390 U.S. 414 (1968) is not to the contrary. That case involved the review of a district court's decision to approve a compromise under pre-1978 bankruptcy code standards. That determination has nothing to do with the adequacy of a disclosure statement under the current bankruptcy code. Certainly, petitioners are not suggesting a disclosure statement must include all of the information presented to a bankruptcy judge in deciding the value of a lawsuit.

II.

THE FIFTH CIRCUIT'S CONCLUSION THAT THE BANKRUPTCY COURT HAD JURISDICTION TO REQUIRE DISCONTINUANCE OF THE CORPORATE LAWSUIT AND THE INDIVIDUAL LAWSUIT, AS PART OF A PLAN OF REORGANIZATION, IS CONSISTENT WITH THE COURT'S DECISION IN *MARATHON*, OTHER ACTIONS BY THE COURT AND THE DECISIONS OF OTHER COURTS

Petitioners urge that their inability to prosecute the Corporate and Individual Lawsuits after the Joint Plan was confirmed, constituted a disposition of "private rights", which could only be accomplished by the district court.[9]

Petitioners are wrong as a matter of substantive law that the bankruptcy judge did not have jurisdiction to approve a Joint Plan which had the effect of preventing petitioners from continuing lawsuits involving state law contract claims. The Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) did not deprive bankruptcy judges of all ability to adjudicate state law claims. In particular, this Court recognized that Congress can constitutionally provide bankruptcy courts with original jurisdiction as a specialized tribunal to enforce statutory rights established by Congress to reshape debtor-creditor relations. *Id.* at 71, 83-83. *see also, Franklin Computer Corporation v. Apple Computer, Inc. (In re Franklin Computer Corp.)*, 60 Bankr. 795, 800 (Bankr. E.D. Pa. 1986). Here, the bankruptcy court functioned in exactly that capacity in valuing the lawsuit and approving the Joint Plan under the requirements of the federal bankruptcy code in order to allow petitioners to be discharged of their debts and productive use made of the physical assets of petitioners.

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[9] By invoking the jurisdiction of the bankruptcy court petitioners should have waived this claim. *see, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

Section 1129 of the bankruptcy code required the bankruptcy judge to assess the value of the lawsuits, as an asset of the estate, just as he assessed the value of the debtors' real property and other assets in determining if the Joint Plan should be approved. 11 U.S.C. § 1129(a)(7)(A)(ii). Once the bankruptcy judge had determined the value of those assets in liquidation (including the lawsuits) was not more than what creditors would realize under the Joint Plan (as required by section 1129(a)(7)(A)(ii)) approval of the Joint Plan was required by the federal bankruptcy code (assuming all other legal requirements were met). Thereafter all the assets covered by the Joint Plan were affected.

Petitioners have not complained in this case that the bankruptcy court did not have jurisdiction to force them to sell real and personal property as contemplated under the Joint Plan. Yet, the action of the bankruptcy court with respect to the lawsuits was no different in substance. By approving the Joint Plan as a matter of federal law, the bankruptcy court was in essence requiring petitioners to transfer the claims upon which they based their lawsuits to Lockheed in exchange for discharge of their debts. The fact that orders of dismissal were entered in those lawsuits goes to the form of that transaction and not its substance. In other words, if the bankruptcy court could not require the prosecution of the lawsuits be discontinued, as called for under the Joint Plan, it would also be prevented from disposing of any other assets because in all of those transactions "private rights" would be affected, at least in petitioners' view. Therefore, if the action of the bankruptcy court in approving the Joint Plan, which required discontinuance of two lawsuits, constitutes disposition of "private rights", within the meaning of *Marathon,* then under the Constitution there can never be a separate bankruptcy court confirming a plan of reorganization subject only to appellate review.

The Courts of Appeals have previously recognized such a result is not a proper reading of *Marathon,* and have consistently upheld the constitutionality of the Interim Emergency Rule, even in situations where adjudications of what would otherwise be viewed as "private rights" occurred, so long as such action was in the context of what is now referred to as a "core proceeding."[10] *see, Oklahoma Health Services Federal Credit Union v. Webb,* 726 F.2d 624 (10th Cir. 1984) (court had jurisdiction to order turnover of property) *Solomon B. Kaiser (In re Kaiser)* 722 F.2d 1574, 1581-82 (2d Cir. 1983) (court had jurisdiction to impose a constructive trust on property held in the name of debtor's wife); *Pizza of Hawaii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii, Inc.),* 761 F.2d 1374 (9th Cir. 1985) (court had jurisdiction to approve plan of reorganization). Stated another way, these cases provide that so long as the action of the bankruptcy court affecting state law claims is a byproduct of entering an order on a traditional bankruptcy matter, jurisdiction could constitutionally be exercised by the bankruptcy judge. In this matter, the order attacked is confirmation of a plan of reorganization, certainly a traditional bankruptcy matter. That order was not a binding final judgment in the lawsuits, but required the debtors to execute releases that allowed the district court to enter the orders actually dismissing the actions. Approval of the Joint Plan was not based on state law but on an interpretation and application of section 1129 of the bankruptcy code. Therefore, while the bankruptcy judge considered state law in confirming the Joint Plan, his final action was based on the federal bankruptcy code. This Court has never suggested such an approach presents any constitutional difficulties, and on two occasions has refused to review the Interim Emergency Rule through applications for original writs. In re *International Harvester Co.* 460 U.S. 1079 (1983); *In re Doan,* 460 U.S. 1068 (1983).

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[10] The current jurisdictional statute for bankruptcy courts, 28 USC. § 157(b)(2)(L) specifically identifies confirmation of a plan as a "core proceeding."

III.

THE FIFTH CIRCUIT'S CONCLUSION THAT THE INVOLVEMENT OF RESPONDENT'S COUNSEL IN THE PREPARATION OF WRITTEN FINDINGS OF FACTS AND CONCLUSIONS OF LAW WAS NOT IMPROPER, IS CONSISTENT WITH PRIOR DECISIONS OF THE COURT AND WILL NOT HAVE THE EFFECT SUGGESTED BY PETITIONERS

Petitioners statement of the case suggests that counsel for respondent had repeated and extensive discussions with the bankruptcy judge in order to formulate that judge's position on confirmation of the plan. Nothing could be further from the truth. Prior to counsel for respondent's involvement in the preparation of written findings and conclusions, the bankruptcy judge had already announced in open court that he was confirming the plan and had read lengthy preliminary findings of fact and conclusions of law.[11]

Counsel for respondent served simply as a scrivener for the bankruptcy judge in the preparation of findings of fact and conclusions of law after a decision had been announced. Although critical of this practice, the Court has held that findings of fact and conclusions of law prepared entirely by the prevailing party (i.e. without any input from the court) will be upheld.[12] *Anderson v. Bessemer City,* 470 U.S. 564, 572 (1985); *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-57 (1964); *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 615 n. 13 (1974). The Fifth Circuit's decision in this case does nothing more than reiterate that conclusion.

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[11] A comparison of the preliminary oral findings and conclusions and the written findings and conclusions establishes they are not "radically different" in substance, although, not surprisingly, the form of the written findings and conclusions is different. Compare Appendix 53a-91a to 92a-118a.

[12] In this matter an extensive hearing was held on petitioners' objections to the written findings of fact and conclusions of law at which time petitioners aired all of their concerns before the findings and conclusions became final.

Petitioners' contention that the Fifth Circuit's opinion will authorize wholesale ex-parte contacts, is specious. A review of the Fifth Circuit's opinion establishes that the conduct the court was referring to as not violating the Texas Code of Professional Responsibility or the Texas Code of Judicial Conduct was the preparation of findings of fact and conclusions of law by the prevailing party. Therefore, the Fifth Circuit's opinion does not suggest that counsel is "free to engage in extensive discussions with the court" concerning a matter that is no longer pending. The Fifth Circuit's holding merely allows, but certainly does not require or encourage, the trial courts to permit the prevailing party to draft findings of fact and conclusions of law. That conclusion is consistent with a recent decision of the Court of Appeals for the Eleventh Circuit involving a similar circumstance, in which the court also refused to set aside the orders in question. *In re Colony Square Co.,* 819 F.2d 272 (11th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 1271 (1988).[13]

Even if the practice of submitting findings of fact and conclusions of law to a court on a matter that has already been decided did violate the Code of Professional Responsibility or the Code of Judicial Conduct, such a violation does not necessarily require the setting aside of those findings or the decision reached. Rather there must be some showing of harm. *In re Colony Square Co., supra,* at 276-277. In this case the decision and underlying findings of fact and conclusions of law have been determined to be supported by the evidence in two previous levels of appellate review preventing petitioners from demonstrating harm.

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[13] *Colony Square* presented a more problematic situation than the facts of this case in that the orders in *Colony Square* were based upon rulings communicated solely to the prevailing party as opposed to being announced in open court.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: October 7, 1988

Respectfully submitted,

/s/ JAMES B. HARRIS

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